

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
)	
Petitions for Waiver of Section 51.917(b)(7) of the Commission's Rules)	

ORDER

Adopted: December 19, 2016**Released: December 19, 2016**

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, consistent with precedent,¹ we grant in part, subject to identified conditions, four petitions seeking waiver of the intercarrier compensation recovery rules permitting carriers to include in their recovery calculations certain funds that they were unable to collect from a carrier customer due to an access charge avoidance scheme and the carrier customer's subsequent bankruptcy.² The requesting incumbent local exchange carriers (LECs) have demonstrated good cause to include in their recovery calculations revenue associated with traffic eligible for compensation that was terminated during Fiscal Year 2011 (FY 2011)³ and that otherwise meets the criteria spelled out in our revenue recovery rules. Including such revenue conforms to the policies underlying the recovery mechanism adopted in the *USF/ICC Transformation Order*.⁴

2. In the *USF/ICC Transformation Order*, the Commission adopted bill-and-keep as the default methodology for all intercarrier compensation (ICC) charges, established a transition path requiring scheduled reductions to ICC charges, and capped all terminating ICC rates in effect as of the effective date of the new rules.⁵ The Commission also adopted a recovery mechanism to partially

¹ See generally *Connect America Fund*; *Developing a Unified Intercarrier Compensation Regime*; *Petitions for Waiver of Section 51.917(b)(7) of the Commission's Rules*, Order, 29 FCC Rcd 9958 (2014) (*Halo Order*); *Connect America Fund*; *Developing a Unified Intercarrier Compensation Regime*; *Petitions for Waiver of Section 51.917(b)(7) of the Commission's Rules*, Order, 30 FCC Rcd 6430 (WCB 2014) (*Halo II Order*).

² See *infra* para. 5 & nn. 16-19.

³ For the purposes of the recovery mechanism, FY 2011 is defined as Oct. 1, 2010, to Sept. 30, 2011. See 47 CFR § 51.903(e).

⁴ See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17956-87, paras. 847-904 (2011) (*USF/ICC Transformation Order*), *pets. for review denied sub nom. In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014); see also 47 CFR § 51.713.

⁵ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17904, 17932, 17934, 18026-28, paras. 740, 798, 801, 970-71; see also 47 CFR § 51.713.

mitigate revenue reductions that incumbent LECs would experience as a result of these ICC reductions.⁶ The Commission designed the recovery mechanism and associated rules to recognize carrier reliance on ICC revenues, but limit recovery in a reasonable manner consistent with the Commission's goals.⁷ At the same time, the Commission recognized the need to limit the burdens such recovery might impose on end-user customers and universal service contributors.⁸

3. On August 7, 2014, the Commission released an Order that granted in part, subject to identified conditions, two petitions seeking waiver of section 51.917(b)(7) of the Commission's rules.⁹ These waivers allowed the requesting carriers to include in their recovery calculations funds they were unable to collect from a carrier customer, Halo Wireless, Inc. (Halo), due to an access charge avoidance scheme and subsequent bankruptcy.¹⁰ In the *Halo Order*, the Commission found "that incumbent LECs, upon a showing of good cause, should be permitted to include in their recovery calculations revenues associated with traffic eligible for compensation that was terminated during FY 2011 and that otherwise meets the criteria spelled out in our revenue recovery rules."¹¹ On June 24, 2015, the Wireline Competition Bureau (Bureau) released a similar Order granting in part, subject to identified conditions, eight additional petitions seeking waiver of section 51.917(b)(7) of the Commission's rules under conditions similar to those described in the *Halo Order*.¹²

4. In this Order we grant in part, subject to identified conditions, four petitions seeking waiver of rule 51.917(b)(7) under conditions substantially similar to those described in the previous *Halo* orders.¹³ Specifically, the carrier requests under consideration here are comparable to the prior waiver requests in that they involve requests to include in their recovery calculations funds they were unable to collect from Halo due to its intercarrier compensation avoidance scheme and subsequent bankruptcy. As the Commission found in the *Halo Order*, "including such revenue in the recovery calculations conforms to the policies underlying the recovery mechanism, and excluding them would undermine those policies."¹⁴

5. The following rate-of-return incumbent LECs filed similar petitions seeking waiver of the rule implementing the recovery mechanism so that each requesting rate-of-return incumbent LEC would be able to include uncollected revenues from Halo in its ICC Base Period Revenue (BPR, or Baseline) amounts. Specifically, the Petitioners filed petitions for limited waivers to add the following amounts to their FY 2011 BPR calculations:

- FairPoint Communications, Inc. seeks to add \$124,531.06;¹⁵

⁶ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17956-87, paras. 847-904.

⁷ See *id.* at 17957, para. 849.

⁸ See *id.* at 17985-86, para. 903.

⁹ See *Halo Order*, 29 FCC Rcd at 9958, para. 2; 47 CFR § 51.917(b)(7).

¹⁰ *Id.*

¹¹ *Id.*

¹² See generally *Halo II Order*, 30 FCC Rcd at 6430.

¹³ The various rate-of-return incumbent LECs covered by the eight additional petitions for limited waiver are collectively referred to here as the "Petitioners."

¹⁴ *Halo Order*, 29 FCC Rcd at 9958, para. 2.

¹⁵ See FairPoint Communications, Inc., Petition for Limited Waiver of Section 51.317(b)(7), WC Docket No. 10-90 et al. (filed Mar. 17, 2015) (FairPoint Petition). FairPoint mistakenly seeks a waiver of section 51.317(b)(7) of the Commission's rules, rather than 51.917(b)(7). To grant the requested relief, the FairPoint requires a waiver of section 51.917(b)(7), 47 CFR § 51.917(b)(7). Accordingly, we will consider its request as if FairPoint had requested a waiver of the correct rule.

- Blountsville Telephone LLC, Brindlee Mountain Telephone LLC, Hopper Telecommunications LLC, Otelco Telephone LLC, and Pine Belt Telephone Company, Inc. (the Alabama LECs) jointly seek to include \$72,437.86;¹⁶
- Brantley Telephone Company, Inc., Pembroke Telephone Company, Inc., Pineland Telephone Cooperative, Inc., Public Service Telephone Company, and Waverly Hall Telephone Company, LLC (the Georgia LECs) jointly seek to include \$121,773.59;¹⁷ and
- Horry Telephone Cooperative, Inc., PBT Telecom, Inc., Palmetto Rural Telephone Cooperative, Inc., and Piedmont Rural Telephone Cooperative, Inc. (the South Carolina LECs) jointly seek to include \$128,826.63.¹⁸

6. For the reasons discussed below, we find that Petitioners have demonstrated good cause for waiver to allow them to add to their respective BPR calculations amounts reflecting intrastate access services and, in some cases, net reciprocal compensation for such traffic routed from Halo and terminated by Petitioners during FY 2011, and billed to, but not collected from, Halo. As the Commission found in the *Halo Order*, absent such waivers, the unique combination of these circumstances would result in significant reductions to Petitioners' ICC recovery mechanism revenues.¹⁹ Further, without some form of Commission action, such impact on recovery amounts would continue far into the future.²⁰ In addition, no parties filed in opposition to the Petitioners' waiver requests.

7. Accordingly, we grant Petitioners' waiver requests subject to the following conditions. Prior to implementation of the relief granted in this Order, each petitioner must certify that: (1) it terminated all the traffic sent to it by Halo during FY 2011 that it seeks to add to its BPR calculations; (2) it billed Halo for such traffic during FY 2011 or before the close of the next regular billing cycle in Fiscal Year 2012 for the amounts to be added to its BPR calculations; (3) a court or regulatory agency of competent jurisdiction has made a finding of liability against Halo regarding the compensation for such traffic; (4) it filed a timely claim in the Halo bankruptcy case requesting compensation for such traffic; and (5) it did not include in its BPR adjustment amounts any interest, late payment fees, collection fees, or attorney fees. In addition, any BPR adjustment for a study area resulting from this Order shall not exceed the unpaid compensation subject to the Commission's recovery rules contained in a Petitioner's bankruptcy claim for that study area.²¹ We emphasize here that we are not providing any monetary relief directly related to billing disputes between Petitioners and Halo.²²

¹⁶ See Petition of Blountsville Telephone LLC, Brindlee Mountain Telephone LLC, Hopper Telecommunications LLC, Otelco Telephone LLC, and Pine Belt Telephone Company, Inc. (jointly referred to as the Alabama LECs) for Limited Waiver of 47 CFR § 51.917(b) of the Commission's Rules, WC Docket No. 10-90, CC Docket No. 01-92 et al. at 1 (filed April 28, 2015) (Alabama LECs Petition).

¹⁷ Emergency Request for Expedited Treatment, Petition of Brantley Telephone Company, Inc., Pembroke Telephone Company, Inc., Pineland Telephone Cooperative, Inc., Public Service Telephone Company, and Waverly Hall Telephone Company, LLC for Limited Waiver of 47 CFR. § 51.917(b)(7)(ii), WC Docket No. 10-90, CC Docket No. 01-92 et al., at 1-11 (filed Jan. 5, 2016) (Georgia LECs Petition).

¹⁸ Emergency Request for Expedited Treatment, Petition of Horry Telephone Cooperative, Inc.; PBT Telecom, Inc.; Palmetto Rural Telephone Cooperative, Inc.; and Piedmont Rural Telephone Cooperative, Inc. for Limited Waiver of 47 CFR. § 51.917(b)(7)(ii), WC Docket No. 10-90, CC Docket No. 01-92 et al., at 1-10 (filed Feb. 1, 2016) (South Carolina LECs Petition).

¹⁹ See *Halo Order*, 29 FCC Rcd at 9959, para. 4.

²⁰ *Id.*

²¹ See generally Claims Register, *In re: Halo Wireless, Inc.*, Case No. 11-42464, Bankr. E.D. Tex. (converted July 19, 2012).

²² The Commission is not the proper venue to request an order of back payment of charges; these collection matters are before the bankruptcy court. See, e.g., *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP*

(continued....)

II. BACKGROUND

A. Recovery Calculations Under the *USF/ICC Transformation Order*

8. In the *Halo Order*, the Commission discussed the relevant ICC reform measures implemented through the *USF/ICC Transformation Order*, including “a transition to reduce certain ICC rates on an annual basis and a recovery mechanism designed to partially offset revenues reduced as a result of the rate transition”²³ (the ICC transition). For rate-of-return incumbent LECs, the calculation of BPR begins the recovery mechanism process. The BPR is the sum of certain ICC intrastate switched access revenues and net reciprocal compensation revenues for services provided during FY 2011 that were collected by March 31, 2012, plus the projected revenue requirement for interstate switched access services provided during the 2011-2012 tariff period.²⁴ The BPR is then reduced by 5% initially and by an additional 5% in each year of the transition.²⁵ The amount a rate-of-return incumbent LEC is entitled to recover in each year of the transition is equal to the adjusted BPR for the year in question less, for each relevant year of the ICC transition, the sum of: (1) projected intrastate switched access revenue; (2) projected interstate switched access revenue; and (3) projected net reciprocal compensation revenue.²⁶ This amount, known as Eligible Recovery, is recoverable through the Access Recovery Charge (ARC)²⁷ assessed on end-users, and, to the extent not recoverable through ARCs, through Connect America Fund ICC support (CAF ICC support).²⁸

9. A rate-of-return incumbent LEC’s BPR is calculated only one time, but it is used during each step of the ICC recovery mechanism calculations for each year of the transition.²⁹ Accordingly, accurate BPR calculations are critical to the successful operation of the recovery mechanism. Rate-of-return incumbent LECs calculated their BPR once as part of their tariff filings in 2012, the first year of the ICC transition, so any inaccuracies in the BPR calculation would carry forward in future recovery mechanism payments.

10. In the *USF/ICC Transformation Order*, the Commission adopted rules designed to ensure that rate-of-return incumbent LECs’ BPR calculations capture revenues for FY 2011 ICC services subject to the ICC rate transition, which are balanced by stringent standards to prevent parties from taking advantage of the recovery mechanism by inflating their BPR.³⁰ For example, the Commission permitted

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Telephony Services are Exempt from Access Charges, WC Docket No. 02-361, Order, 19 FCC Rcd 7457, 7472, para. 23 n.93 (2004) (“Under sections 206-209 of the Act, the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges. Therefore we expect that LECs will file any claims for recovery of unpaid access charges in state or federal courts, as appropriate.”).

²³ *Halo Order*, 29 FCC Rcd at 9960, para 6 (citing *USF/ICC Transformation Order*, 26 FCC Rcd at 17934, para. 801 Fig. 9 (Intercarrier Compensation Reform Timeline)); see also *USF/ICC Transformation Order* 26 FCC Rcd at 17957-61, paras. 850-53 (summarizing the Commission’s approach to the recovery mechanism).

²⁴ See 47 CFR § 51.917(b)(7); the 2011-2012 tariff period was July 1, 2011, through June 30, 2012.

²⁵ See 47 CFR § 51.917(b)(3).

²⁶ 47 CFR § 51.917(d). The demand projections that are part of these projected revenue calculations are “trued-up” after two years. See 47 CFR § 51.917(d)(iii)(D).

²⁷ The ARC is the end-user charge component of the ICC recovery mechanism adopted in the *USF/ICC Transformation Order*. Incumbent LECs are authorized to charge ARCs, subject to annual caps and to an overall rate ceiling, in order to partially mitigate the effect of reduced intercarrier revenues on carriers. See *USF/ICC Transformation Order*, 26 FCC Rcd at 17677, para. 36, 17957, para. 849; see also 47 CFR §§ 51.915(e), 51.917(e).

²⁸ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17981, para. 896.

²⁹ See 47 CFR § 51.917(d).

³⁰ See generally *USF/ICC Transformation Order*, 26 FCC Rcd at 17977-86, paras. 891-904 (describing the recovery mechanism for rate-of-return LECs).

rate-of-return incumbent LECs to calculate their BPR to include minutes-of-use (MOUs) related to access service provided during FY 2011, but it prohibited rate-of-return incumbent LECs from including in BPR calculations MOUs for which “revenues were not recovered, for whatever reason.”³¹ Constraining BPR in this manner is one of several methods the Commission adopted to prevent excessive recovery from end users and the federal universal service fund.³²

B. Halo Wireless

11. Halo is “a Commercial Mobile Radio Service (CMRS) provider that functions as an intermediate provider, i.e., one that “carries or processes traffic that traverses or will traverse the public switched telephone network, but it neither originates nor terminates traffic.”³³ Halo perpetrated a scheme that involved taking calls originated by other carriers, routing them through Halo as the intermediary carrier, and then claiming that such calls were originated by a CMRS provider and subject to the intraMTA rule.³⁴ In the *USF/ICC Transformation Order*, however, the Commission made clear that the routing of a call over a wireless link in the middle of the call path did not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation.³⁵ By characterizing the traffic as CMRS-originated traffic, Halo attempted to avoid paying the requisite compensation to terminating LECs.³⁶

12. In their pleadings, the Petitioners describe their experiences terminating intrastate access and, in some cases, net reciprocal compensation traffic sent to them by Halo during FY 2011, billing Halo for this service, Halo’s refusal to pay based on its theory that the traffic is not subject to access or other ICC charges, and the Petitioners’ efforts to collect these revenues from Halo.³⁷ Notably, the rate-of-return incumbent LECs requesting relief under consideration in this Order pursued remedies in the Halo bankruptcy case.³⁸ No parties filed comments or replies on the petitions under consideration in this Order.

³¹ See *id.* at 17982, para. 898. The Commission further specified that, in order to be included in a rate-of-return incumbent LEC’s BPR, revenues associated with MOUs had to be collected by March 31, 2012. 47 CFR § 51.917(b)(7).

³² The Commission also adopted rules requiring rate-of-return incumbent LECs to adjust their BPRs to reflect removal of any increase in revenue requirement or revenues resulting from access stimulation activities during the relevant time period. See 47 CFR § 51.917(c); see also *USF/ICC Transformation Order*, 26 FCC Rcd at 17956, para. 847.

³³ *Halo Order*, 29 FCC Rcd at 9961, para. 9. See also *USF/ICC Transformation Order*, 26 FCC Rcd at 18041-42, para. 1005.

³⁴ See *USF/ICC Transformation Order*, 26 FCC Rcd at 18041-42, para. 1005. Under the intraMTA rule in effect during the relevant time period, CMRS-to-LEC traffic that originated and terminated in the same MTA was subject to reciprocal compensation rather than access charges. 47 CFR § 51.701(b)(2) (2010). This rule was revised by the *USF/ICC Transformation Order* to define such traffic as “Non-Access Telecommunications Traffic.” See 47 CFR § 51.701(b) (2012).

³⁵ See *USF/ICC Transformation Order*, 26 FCC Rcd at 18042, para. 1006.

³⁶ By doing so, Halo not only attempted to disguise traffic otherwise subject to access charges as subject to reciprocal compensation, but also attempted to avoid paying any compensation for traffic terminated by the LECs. See Alabama LECs Petition at 4-5; FairPoint Petition at 4; Georgia LECs Petition at 5; South Carolina LECs Petition at 4.

³⁷ See Alabama LECs Petition at 4-5; FairPoint Petition at 4-5; Georgia LECs Petition at 5-6; South Carolina LECs Petition at 4-5.

³⁸ See Alabama LECs Petition at 9; FairPoint Petition at 5; Georgia LECs Petition at 10; South Carolina LECs Petition at 10.

III. DISCUSSION

A. Waivers Concerning Base Period Revenue Calculations

13. Generally, the Commission's rules may be waived under section 1.3 of our rules for "good cause shown."³⁹ The Commission may exercise its discretion to waive a rule where: (a) the particular facts make strict compliance inconsistent with the public interest; (b) special circumstances warrant a deviation from the general rule; and (c) such deviation will serve the public interest.⁴⁰ In making these determinations, the Commission may consider evidence of hardship, equity, and more effective implementation of overall policy on an individual basis.⁴¹ For the reasons discussed below, we find that Petitioners have demonstrated good cause that justifies granting the requested waivers, and that doing so would be consistent with the public interest. In addition, no parties publicly opposed the grant of these petitions.

14. In the *USF/ICC Transformation Order*, the Commission explicitly contemplated that certain circumstances could justify adjustments to recovery baseline amounts, and described some situations where adjustments may be appropriate.⁴² Specifically, the Commission noted that carriers may file requests for "waiver of our rules defining the Baseline to account for revenues billed for terminating switched access service or reciprocal compensation provided in FY 2011 but recovered after the March 31, 2012 cut-off as the result of the decision of a court or regulatory agency of competent jurisdiction."⁴³

15. In the *Halo Order*, the Commission considered the guidance provided in the *USF/ICC Transformation Order* as applied to the circumstances surrounding Halo.⁴⁴ It determined that the *Halo Order* petitioners "have not recovered the revenues that they seek to include in their BPR and, as a result of Halo's bankruptcy protection, it is unlikely that they will. Accordingly, Petitioners' ability to fall within the four corners of that guidance is at best delayed, and is ultimately uncertain."⁴⁵ The Commission further reasoned that "it would be contrary to, and would impede effective implementation of these policies if Halo's non-payment due to bankruptcy for services that were provided locked providers harmed by Halo's non-compliance into a lower BPR for the duration of the ICC rate transition."⁴⁶

16. Given the similarity in circumstances here, we find that inclusion of the revenues associated with unpaid amounts billed to Halo in the BPR calculations, coupled with sufficient safeguards as defined herein, would produce appropriate recovery calculations for the Petitioners. In particular, Petitioners claim that they were unable to include revenues from intrastate access charges and/or net reciprocal compensation amounts billed to Halo for service provided during FY 2011 because Halo

³⁹ 47 CFR § 1.3; *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁴⁰ *Ne. Cellular*, 897 F.2d at 1166.

⁴¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Ne. Cellular*, 897 F.2d at 1166.

⁴² See *USF/ICC Transformation Order*, 26 FCC Rcd at 17982, para. 898 n.1745.

⁴³ *Id.*

⁴⁴ "The ICC recovery mechanism adopted in the [*USF/ICC Transformation Order*] was designed, among other things, to provide predictability to incumbent LECs that had been receiving implicit ICC subsidies and to mitigate marketplace disruption during the ICC reform transition." *Halo Order*, 29 FCC Rcd at 9963-64, para. 17 (citing *USF/ICC Transformation Order*, 26 FCC Rcd at 17962, para. 858).

⁴⁵ *Id.*

⁴⁶ *Id.*

initially and wrongly refused to pay for the services provided, and Halo's subsequent bankruptcy likely will preclude Petitioners from ever receiving payment for such services.⁴⁷

17. As noted above, some Petitioners are seeking a waiver to include in their BPR calculations not only intrastate access revenues, but also reciprocal compensation amounts billed to Halo. Thus, some of the waiver requests under consideration here are somewhat broader in scope than those conditionally granted in the *Halo Order*. We find that there is nothing about the nature of reciprocal compensation revenues that would warrant a different decision. Both collected intrastate access revenues and collected reciprocal compensation revenues were included in establishing Base Period Revenue. The rationale offered in support of the conditional grant with respect to uncollected intrastate access revenues in the *Halo Order* would apply equally to any uncollected reciprocal compensation revenues billed to Halo. The fact that some of the requests included an additional category of revenues thus does not undermine or otherwise change our analysis of the justification relied upon in the *Halo Order*.⁴⁸

18. For the reasons discussed above, we believe that Petitioners have demonstrated good cause for waiver to allow them to include revenues in their BPR calculations for intrastate access and, if requested, net reciprocal compensation for services provided to Halo during FY 2011 and billed, but not collected, from Halo.⁴⁹ To ensure that the Petitioners' adjustments to their BPR calculations include only uncollected revenues billed to Halo for eligible traffic terminated during FY 2011, we grant Petitioners' waiver requests subject to the following conditions.⁵⁰ Prior to the implementation of the relief granted in this Order, each Petitioner must, in order to receive such relief, certify under penalty of perjury the following:

- First, that it terminated all of the intrastate access and if applicable, reciprocal compensation traffic (compensable traffic), sent to it by Halo for termination during FY 2011 that it seeks to add to its BPR calculations. This condition will limit BPR adjustments to reflect traffic for which compensable services that were actually provided.
- Second, that it billed Halo for such compensable traffic during FY 2011 or before the close of the next regular billing cycle in Fiscal Year 2012 for the amounts to be added to BPR calculations. This condition is designed to limit BPR adjustments to those relating to revenue that Petitioners attempted to collect from Halo for the provision of compensable traffic during FY 2011.

⁴⁷ See Alabama LECs Petition at 4-5; FairPoint Petition at 4-5; Georgia LECs Petition at 5-6; South Carolina LECs Petition at 4-5. See also Letter from Karen Brinkman, Counsel to FairPoint Communications, Inc. to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 and WC Docket No. 10-90, at 1-2 (filed Jun. 1, 2015).

⁴⁸ We recognize that charges for reciprocal compensation amounts are not imposed via tariffs and that this distinction may raise questions as to whether reciprocal compensation charges were owed under the existing carrier arrangements. See *Developing a Unified Intercarrier Compensation Regime*; *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (2005), *remanded sub nom. Ronan Tel. Co. v. FCC*, 539 F. App'x 722 (9th Cir. 2013); Order on Remand, 29 FCC Rcd 11521 (2014). Below, however, we require certification that a court or state regulatory agency of competent jurisdiction (e.g., a state commission) has made a finding of liability against Halo regarding each category of compensation, including reciprocal compensation amounts.

⁴⁹ See *Halo Order*, 29 FCC Rcd at 9965-66, para 23 (requiring certification that each Petitioner has "filed a timely claim in the Halo bankruptcy case requesting compensation for such traffic").

⁵⁰ *Id.*

- Third, that a court or state regulatory agency of competent jurisdiction (e.g., a state commission) has made a finding of liability against Halo regarding each category of the requested compensation for such traffic.⁵¹
- Fourth, that it filed a timely claim in the Halo bankruptcy case that requests compensation for such traffic, and any BPR adjustment for a study area resulting from this Order does not exceed the terminating portion of such petitioner's bankruptcy claim for that study area. These requirements are intended to prevent Petitioners from taking actions now to increase their BPR adjustments beyond the amounts of their claims in the Halo bankruptcy case.
- Fifth, that its BPR adjustment amounts do not include any interest, late payment fees, collection fees, or attorney fees, in order to ensure that BPR adjustments are limited to revenue associated with compensable traffic, and do not include other types of revenue. In addition, such certification must confirm that the revenues supporting the requested BPR adjustments are not already included in the BPR calculations.

B. Waiver of the Imputation Requirement

19. It is important to note at the outset that Petitioners are all rate-of-return incumbent LECs. All of the Petitioners, except for Horry Telephone Cooperative (Horry Tel), both recovered the maximum amount possible from ARCs and received CAF ICC support in tariff years 2012, 2013, and 2014. Therefore, any additional recovery mechanism revenue that these Petitioners receive as a result of this Order for 2012, 2013, and 2014, and potentially for future tariff years, will come from CAF ICC support and not from ARCs.⁵²

20. Horry Tel had ARC rates that were limited by the amount of Eligible Recovery it was entitled to receive in 2014. Had the relevant Halo revenues been included in determining the collected revenue used in the Eligible Recovery calculation for each tariff period since 2012, Horry Tel would have been required in 2014 to either: (1) charge a higher ARC than it did in one or more years; or (2) impute the higher ARC charge in its Eligible Recovery calculations consistent with section 51.917(f)(2) of the Commission's rules.⁵³ There is, however, no means for Horry Tel to assess a higher tariffed rate for prior periods. Thus, the only way to give this carrier the additional recovery afforded in this Order for prior periods is to waive the imputation rule set forth in section 51.917(f)(2) and allow it to recover additional CAF ICC from USAC equal to the additional Eligible Recovery that would have been recovered through higher ARC rates if the uncollected Halo revenues had been included in the calculation of each year's Eligible Recovery.

21. In the *Non-Halo Recovery Order*, the Commission considered whether to waive the imputation requirement in section 51.917(f)(2) for carriers revising their BPR amounts consistent with ICC recovery waivers.⁵⁴ These carriers received a waiver to amend their BPR amounts in the *Halo II Order* but had ARC rates that were limited by the amount of Eligible recovery they were entitled to receive for periods preceding grant of the waiver.⁵⁵ The Commission determined that, under the

⁵¹ For example, a Petitioner shall cite to a finding of liability against Halo for intrastate access and/or net reciprocal compensation revenues if it requests to add intrastate access and/or net reciprocal compensation revenues to its BPR calculation for its requested study area.

⁵² See 47 CFR § 51.917(e).

⁵³ 47 CFR § 51.917(f)(2).

⁵⁴ See *Connect America Fund; Developing a Unified Intercarrier Compensation Regime; Petitions for Waiver of Section 51.917 of the Commission's Rules*, Order, 31 FCC Rcd 12021, 12030-31, paras. 24-26 (rel. Oct. 20, 2016) (*Non-Halo Recovery Order*).

⁵⁵ *Id.* at 12030, para. 24.

circumstances, waiver of the imputation requirement for prior periods was in the public interest because strict compliance with the imputation requirement would have denied these carriers some portion of the recovery amount that the *Halo II Order* intended to provide.⁵⁶ Accordingly, the Commission waived application of the imputation rule set forth in section 51.917(f)(2) and allowed the carriers to recover additional CAF ICC from the Universal Service Administrative Company (USAC) equal to the additional Eligible Recovery that would have been recovered through higher ARC rates if the relevant revenues had been included in the calculation of each year's Eligible Recovery.⁵⁷

22. As discussed above, the Commission may exercise its discretion to waive a rule where (a) the particular facts make strict compliance inconsistent with the public interest; (b) special circumstances warrant a deviation from the general rule; and (c) such deviation will serve the public interest.⁵⁸ The Commission already determined that the facts surrounding the access avoidance scheme and subsequent bankruptcy of the carrier customer Halo presented the special circumstances necessary to support a waiver of the Commission's recovery rules.⁵⁹ Horry Tel could not have charged a higher ARC than it did because it is precluded from assessing a higher tariffed ARC rate retroactively for these prior periods.⁶⁰ Because it cannot charge a higher ARC retroactively, absent a waiver, Horry Tel would be required to impute a higher ARC charge in their revised calculations for prior periods.

23. As the Commission found in the *Non-Halo Recovery Order*, strict compliance with the imputation requirement in such circumstances would essentially deny a carrier some portion of the recovery amount that the waiver was intended to provide. The circumstances surrounding possible waiver of the imputation requirement here are identical to those described in the *Non-Halo Recovery Order*. The only mechanism by which to fully effectuate this waiver and provide Horry Tel with the total amount of revised recovery it is entitled to for prior periods is for us to waive the imputation rule set forth in section 51.917(f)(2). Doing so will allow Horry Tel to recover additional CAF ICC from USAC equal to the additional Eligible Recovery that would have been recovered through higher ARC rates if the relevant revenues had been included in the calculation of each year's Eligible Recovery. Under these unique circumstances, waiver of the imputation requirement is consistent with the public interest and recovery of these amounts from CAF ICC rather than ARC charges should not have any measurable impact on the overall Connect America Fund. Accordingly, we waive the imputation requirement contained in section 51.917(f)(2) of the Commission's rules to the extent necessary to effectuate this result.

IV. ADMINISTRATIVE IMPLEMENTATION OF RELIEF GRANTED

24. This section addresses how the amount of relief granted in this Order is to be determined and the process for payment by the Universal Service Administrative Company (USAC).⁶¹ For the purpose of adding the relevant Halo revenues to their BPR calculations, Petitioners shall determine for each affected study area the amount of unpaid terminating intrastate and/or net reciprocal compensation

⁵⁶ *Id.* at 12030, para. 25.

⁵⁷ *Id.* at 12031, para. 26.

⁵⁸ *See supra* para. 13.

⁵⁹ *See Halo Order*, 29 FCC Rcd at 9964-66, paras. 18, 23; *Halo II Order*, 30 FCC Rcd at 6430, para. 1.

⁶⁰ The portion of a rate-of-return LEC'S Eligible Recovery that the carrier could recover through an ARC charge was constrained by three inter-related conditions: (1) the residential ARC could not exceed a maximum amount specified in section 51.917(e)(6)(i); (2) the residential ARC could not cause the residential rate ceiling to exceed \$30 per month, section 51.915(b)(12); and (3) the residential ARC could not increase more than \$0.50 in any year, section 51.917(e)(6)(vi).

⁶¹ USAC plays a critical role in the day-to-day administration of universal service support mechanisms. *See, e.g., Connect America Fund et al.*, WC Docket No. et al., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4595, para. 116 n.192.

revenues that were billed to Halo during FY 2011 for which a court or state regulatory agency of competent jurisdiction has determined liability against Halo and that are associated with the waiver requests. This number represents the amount billed to Halo that was uncollected by each Petitioner for each affected study area for terminating services rendered during FY 2011 and it is the starting point for determining the amount recoverable pursuant to these waivers. To derive a representative collected revenue amount for the amounts billed to Halo, each Petitioner shall adjust the billed amount by the uncollectible factor used for the initial BPR determination for the relevant study area. The lesser of the adjusted amount or the Petitioner's claim amount in the Halo bankruptcy case or a state commission award for each affected study area is the increase that the Petitioner may make for that particular study area in its BPR calculations. Each Petitioner shall include this increase to the appropriate collected revenue amount shown in its 2012 and subsequent year tariff support materials.⁶²

25. In addition, Petitioners are required to file with the Commission—and certify to the accuracy of—the different categories of charges (e.g., intrastate access, interstate access, net reciprocal compensation, interest, late payment fees, collection fees, attorney's fees) and amounts for each category included in their Halo bankruptcy or state commission claims.⁶³ For the specific purpose of implementing the relief granted in this Order, each Petitioner shall submit to USAC and the relevant state commission revised data that was filed pursuant to section 54.304(d) of the Commission's rules.⁶⁴ Each Petitioner should note the DA number of this Order as authority for the request and include supporting documentation for the calculations. An officer of the company must certify, under penalty of perjury, that the requested amount is calculated in a manner consistent with the requirements of this Order.

26. To effectuate the relief granted by this waiver, Petitioners shall file with the Commission in the Electronic Tariff Filing System corrected Tariff Review Plan (TRP) worksheets with amended Eligible Recovery amounts, as well as the required certifications. Each petitioner shall also file a notice of its corrected TRP filing in the Electronic Comment Filing System (ECFS) in WC Docket No. 10-90, and must e-mail a copy of the notice to Richard Kwiatkowski, Pricing Policy Division, Wireline Competition Bureau, at Richard.Kwiatkowski@fcc.gov. If a state commission or other interested person objects to the revised data, it shall file its objection in WC Docket No. 10-90 within 21 days of the filing of the notice in ECFS. The Bureau will release a Public Notice in WC Docket No. 10-90 directing USAC to withhold payment while the Bureau resolves objections.⁶⁵ If such a Public Notice is not released in the relevant docket within 45 days of a petitioner's request, USAC shall proceed to process the petitioner's request and issue payment. The Commission has delegated authority to the Bureau to determine and carry out appropriate procedures to resolve objections.⁶⁶

V. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i) and (j), 201-202, 251, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201-202, 251, and 254, and sections 0.91, 0.201(d), 0.291 and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.201(d), 0.291 and 1.3, the Petition for Limited Waiver filed by FairPoint Communications, Inc., Blountsville Telephone LLC, Brindlee Mountain Telephone LLC, Hopper Telecommunications LLC, Otelco

⁶² If there is a subsequent court or state regulatory agency decision regarding the amount of damages for which Halo is liable, the petitioner must notify the Commission and provide a copy of such decision within 30 days. If appropriate, the Petitioner would need to adjust its BPR calculations accordingly within the requirements found in paragraphs 24-26 of this Order.

⁶³ As discussed above, Petitioners are prohibited from including interest, late payment fees, collection fees, or attorney fees in their claims under this condition. *See supra* para. 7.

⁶⁴ 47 CFR § 54.304(d).

⁶⁵ *See Halo Order*, 29 FCC Rcd at 9967, para. 27.

⁶⁶ *Id.*

Telephone LLC, Pine Belt Telephone Company, Inc., Brantley Telephone Company, Inc., Pembroke Telephone Company, Inc., Pineland Telephone Cooperative, Inc., Public Service Telephone Company, Waverly Hall Telephone Company, LLC, Horry Telephone Cooperative, Inc., PBT Telecom, Inc., Palmetto Rural Telephone Cooperative, Inc., and Piedmont Rural Telephone Cooperative, Inc. ARE GRANTED to the extent specified herein, and ARE OTHERWISE DENIED.

28. IT IS FURTHER ORDERED that the imputation requirement in section 51.917(f)(2) is WAIVED for Horry Telephone Cooperative, Inc. as specified herein.

29. IT IS FURTHER ORDERED that the Universal Service Administrative Company SHALL MAKE PAYMENTS in accordance with the requirements of paragraphs 25 and 26 of this Order.

30. IT IS FURTHER ORDERED that pursuant to section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Matthew S. DelNero
Chief
Wireline Competition Bureau